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IN THE

Supreme Court of the United States

October Term, 1982

GILBERT A. HARING, *et al.*,

Petitioners;

v.

JOHN FRANKLIN PROSISE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Whether respondent is precluded by the conventional doctrine of collateral estoppel from litigating, in an action under 42 U.S.C. §1983, Fourth Amendment claims which were neither raised nor litigated in his state criminal prosecution.

A. Whether a damages remedy under 42 U.S.C. §1983, based upon deliberate violations of respondent's Fourth Amendment rights, is barred as a matter of law merely because he entered a guilty plea in state court without regard for the motivations and circumstances underlying the plea.

B. Whether a rule which limits persons injured by deliberate Fourth Amendment violations to seeking exclusion of evidence illegally obtained as the sole remedy for violations of their rights comports with sound public policy.

II. Whether respondent knowingly and intentionally waived his statutory right to seek money damages under 42 U.S.C. §1983 for deliberate violations of his Fourth Amendment rights by pleading guilty in state court.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit reversing the District Court's dismissal of respondent's *pro se* complaint is reported at 667 F.2d 1133 (1981), and is set forth in the Joint Appendix (J.A. 57-84).[1] The order of the District Court dismissing respondent's *pro se* handwritten complaint is unreported, but is set forth in the Joint Appendix (J.A. 46-56).

JURISDICTION

The order of the United States District Court for the Eastern District of Virginia, Alexandria Division, was entered on April 17, 1979 in *John F. Prosise v. Lt. Gilbert A. Haring, et al.*, Civil Action No. 79-105-AM (J.A. 46-56). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 30, 1981 in *Prosise v. Haring, et al.*, Docket No. 79-6310 (J.A. 57-84). The petition for rehearing and suggestion for hearing *en banc* was denied by the Court of Appeals on March 19, 1982 (J.A. 86-87). The petition for a writ of certiorari was granted by this Court on October 12, 1982, and counsel for respondent received Petitioners' Brief on November 30, 1982. By letter dated December 8, 1982 from Alexander L. Stevas, Clerk of the Supreme Court, the time for filing the Brief For Respondent was extended to and including January 29, 1983. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

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[1]References to the Joint Appendix filed with Petitioners' Brief shall be referred to as (J.A. _____).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1738 provides in pertinent part:

> Such Acts, records and judicial proceedings [of a state] or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

This case arose when respondent filed a federal civil rights action under 42 U.S.C. §1983 seeking monetary damages from police officers of Arlington County, Virginia, based upon their deliberate conduct in illegally searching respondent's apartment and altering the scene to fabricate a plain view observation which was later used to obtain a search warrant authorizing seizure of contraband found by the police in respondent's apartment (J.A. 6-12). The District Court dismissed the complaint, holding that respondent's plea of guilty in state court collaterally estopped him from litigating in federal court the question of the lawfulness of the police conduct or, in the alternative, that respondent had waived his Fourth Amendment claims by pleading guilty (J.A. 52, 55). The Court of Appeals reversed, noting that *Allen v. McCurry*, 449 U.S. 90 (1980), requires federal courts to apply conventional doctrines of collateral estoppel to §1983 suits raising Fourth Amendment claims, and holding that respondent is not barred by the well-established doctrine of collateral estoppel from litigating his claims. The court also rejected petitioners' argument that respondent waived his Fourth Amendment claims by pleading guilty.

Respondent John Franklin Prosise commenced this lawsuit by filing a handwritten *pro se* complaint in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging that petitioners violated his Fourth and Fourteenth Amendment rights while acting under color of state law (J.A. 6-12).[2] Respondent alleged

[2]Petitioners' Statement of Facts is drawn in part from "the affidavits of the officers in support of their motions to dismiss and for summary judgment" (Petitioners' Brief 5 n. 1). However, because the District Court granted the motion for summary judgment (J.A. 46-56), respondent's version of the facts as alleged in his original complaint must be accepted as true on review by this Court. *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

that petitioners arrested him in his home on September 7, 1977 (J.A. 7-8). When he returned home upon his release from custody, respondent found a search warrant which falsely stated that certain chemicals had been seen by the police in plain view in the living room (J.A. 8). Respondent alleged that petitioners "searched [the] apt. and moved chemicals so they would be in plain sight, before getting the search warrant" (J.A. 8). He claimed that petitioners "conspired to move chemicals from boxes in [the] closet, to the living room in plain sight" (J.A. 9), and that they "conspired to keep silent, the truth" (J.A. 9). Respondent also alleged that petitioner Allen "falsified and swore to an affidavit to gain a legal search warrant" (J.A. 9) which had as its basis Allen's plain view observation of chemicals in respondent's apartment (J.A. 24). Finally, respondent claimed that several of the "factory seals had been broken on some of the bottles of chemicals, and some of the chemicals in them disposed of to make them look used" (J.A. 8).

Respondent eventually was charged in a two-count indictment with possessing and manufacturing phencyclidine, and on April 27, 1978, respondent entered a guilty plea to one count of manufacturing phencyclidine in exchange for the Commonwealth Attorney's written agreement to enter a *nolle prosequi* to the charge of possession of phencyclidine (J.A. 26-28). On June 15, 1978, respondent was sentenced to a period of twenty-five years in the penitentiary and was fined $1,000 plus court costs (J.A. 44).

In the District Court petitioners moved for summary judgment on respondent's Fourth Amendment claims on the ground that he "is barred under the doctrine of collateral estoppel as a result of the ... guilty plea to a criminal charge wherein the issue was necessarily adjudicated and waived" (J.A. 20-21). The District Court granted the motion, ruling that respondent's "guilty plea estops him from asserting a

fourth amendment claim in this §1983 suit [because t]he plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful" (J.A. 52). As an alternative ground, the District Court concluded that respondent's "guilty plea cut off his access to a federal habeas corpus forum to litigate a fourth amendment claim and at the same time should have a similar effect upon a §1983 suit" (J.A. 55).

On appeal, the undersigned counsel of record was appointed to represent respondent before the United States Court of Appeals for the Fourth Circuit. After the briefs were submitted to that court, but prior to oral argument, this Court granted a writ of certiorari in the case of *Allen v. McCurry, cert. granted,* 48 U.S.L.W. 3535 (U.S. Feb. 19, 1980)(No. 79-935). Consequently, following oral argument the Court of Appeals stayed this case pending resolution of *Allen.*

After this Court rendered its decision in *Allen v. McCurry,* 449 U.S. 90 (1980), the Court of Appeals requested the parties to brief and argue the case in light of *Allen.* On December 30, 1981, the Court of Appeals reversed the District Court's disposition of the Fourth Amendment claims, remanding the case for appropriate action. The Court of Appeals held that respondent's guilty plea does not waive or bar his statutory right to litigate his Fourth Amendment claims in this suit under §1983 (J.A. 64-65, 77), holding that "a general rule of non-preclusion should obtain with respect to search and seizure issues in guilty plea cases" (J.A. 81).

Petitioners sought a rehearing or a rehearing *en banc* in the Court of Appeals, which was denied by the panel and by an evenly divided court on March 19, 1982. Petitioners then sought a writ of certiorari from this Court, which was granted on October 12, 1982.

SUMMARY OF ARGUMENT

The gravamen of this case is whether a damages remedy under 42 U.S.C. §1983 based upon deliberate violation of an individual's Fourth Amendment rights by the police may be barred as a matter of law whenever the individual pleads guilty to a criminal charge *regardless* of the motivations and specific circumstances underlying the plea. Petitioners argue in favor of a *per se* rule that entry of a guilty plea acts to bar *all* subsequent civil actions based on antecedent police misconduct. Respondent, on the other hand, submits that unlawful police conduct should not go unpunished merely because the illegal search uncovers contraband, but rather that persons should be encouraged to admit their guilt without invoking the exclusionary rule and then pursue their civil damages remedies against the erring police officers for the antecedent Fourth Amendment violations. This approach is particularly appropriate in cases such as this where the §1983 plaintiff seeks neither a declaration that the conviction is invalid, nor an injunction to prevent its enforcement.

Although §1983 may not have been an efficacious remedy for civil rights violations at the time the exclusionary rule was made applicable to the states, the statute has been strengthened considerably over the years. Section 1983 now provides a distinct but complementary alternative to the exclusionary rule for those persons willing to admit their guilt. This approach maintains the focus of the criminal trial on the question of the guilt or innocence of the accused, while permitting the collateral consequences of unlawful police conduct to be borne by the erring officers personally rather than by society at large. In short, society will benefit because all guilty parties will personally suffer the consequences of their unlawful conduct rather than permitting "the guilty ...

to go free because the constable has blundered," *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), or permitting the constable to go free because the defendant has admitted his or her guilt.

This approach is entirely consistent with the conventional doctrine of collateral estoppel which bars relitigation of claims that were litigated and decided in an earlier action, but leaves the parties free to litigate claims neither in issue nor decided in the earlier action, even though such claims could have been tendered and decided at that time. Because this Court held that conventional doctrines of collateral estoppel apply in §1983 actions, *Allen v. McCurry*, 449 U.S. 90 (1980), respondent is free under that doctrine to challenge the lawfulness of the police conduct in this case even though he pleaded guilty in state court. This is particularly true here because 28 U.S.C. §1738 (1976) requires federal courts to apply the rules of preclusion of the state in which the alleged constitutional violation arose, and Virginia gives no preclusive effect to criminal convictions whether obtained by plea or by trial.

Since nothing actually is "litigated" in a guilty plea, it should have no preclusive effect in a subsequent civil action even on elements of the offense. Moreover, because questions of the lawfulness of antecedent searches and seizures are irrelevant to the issue of factual guilt and are not litigated or admitted by a plea of guilty, the plea should have no preclusive effect on such questions in a subsequent civil action. This result is in accord with conventional principles of collateral estoppel, and with the strong public policy of providing an *effective* means of deterring unlawful police conduct while punishing those guilty of criminal offenses.

The fact that the state provides a mechanism for excluding unlawfully seized evidence of guilt should not, without more, preclude litigation of antecedent constitutional claims in a §1983 action. Unless the state's rules of preclusion bar a

subsequent civil action where available mechanisms are not pursued, no reason in either law or public policy countenances preclusion in an action under § 1983.

Finally, the choice to forego litigating a suppression motion in favor of entering a guilty plea does not indicate an intentional relinquishment of a statutory cause of action under § 1983. Respondent does not challenge the lawfulness of his guilty plea or conviction; nor does he seek his release from custody. Because habeas corpus is the proper means for obtaining such relief, and because an action under § 1983 for money damages is designed to afford relief of an entirely different nature, cases holding that habeas corpus relief for antecedent constitutional claims is barred by a guilty plea are inapposite to this action for damages under § 1983.

Moreover, a § 1983 action for damages will not permit persons to attack their convictions collaterally since they still will be foreclosed from habeas corpus relief by their pleas of guilty regardless of the outcome of a § 1983 action. For that reason, interests of comity and federalism are not undermined by permitting a subsequent action under § 1983. Although the collateral consequences of a guilty plea justifiably foreclose subsequent habeas corpus attacks upon the validity of the plea, no reason exists to extend that result to the point of precluding a statutorily created remedy for violations of the federal constitution which in no way implicate the finality of the state conviction.

ARGUMENT

I.

RESPONDENT IS NOT PRECLUDED FROM BRINGING AN ACTION IN FEDERAL COURT UNDER 42 U.S.C. §1983 TO LITIGATE SEARCH AND SEIZURE CLAIMS WHICH WERE NEITHER RAISED NOR LITIGATED IN HIS STATE CRIMINAL TRIAL.

The essential question presented by this case is whether 42 U.S.C. §1983 may be invoked as an alternative to the exclusionary rule to redress deliberate violations of the Fourth Amendment by state agents. More precisely, is respondent precluded by his guilty plea from litigating in a federal §1983 action search and seizure claims which were neither presented to nor determined by the state court, and which cannot be raised in either state or federal court by way of habeas corpus? In ruling that respondent is not precluded from litigating such claims, the court below created "a general rule of non-preclusion ... with respect to search and seizure issues in guilty plea cases." *Prosise v. Haring*, 667 F.2d 1133, 1141 (4th Cir. 1981). Respondent submits that the decision of the Circuit Court was correct and should be affirmed by this Court.

A. *Allen v. McCurry* Held That, Although Conventional Doctrines Of Collateral Estoppel Apply In §1983 Suits Raising Fourth Amendment Claims, Federal Courts Must Apply The Rules Of Preclusion Of The State In Which The Claim Arose.

Prior to the decision in *Allen v. McCurry*, 449 U.S. 90 (1980), the question whether the related doctrines of res judicata and collateral estoppel generally are applicable to §1983 actions was unsettled. In *Allen*, however, this Court affirmatively answered the question, ruling that "[t]he Court of Appeals erred in holding that McCurry's inability to obtain habeas corpus relief upon his Fourth Amendment claim renders the doctrine of collateral estoppel inapplicable to his §1983 suit." *Id.* at 105. Since respondent also is unable to obtain habeas corpus relief, a determination of the preclusive effect to be given his guilty plea in this §1983 suit must begin with an examination of *Allen*.

The *Allen* Court began its analysis by restating the conventional rules of preclusion:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Id. at 94 (citations omitted). After articulating the general rule and canvassing the development of the rules of preclusion in federal courts, the Court identified the "one general limitation" (*id.* at 95) on the doctrine of collateral estoppel: "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Id.* at 95. Finally, the Court pointed out that federal respect for state court judgments is not a matter of judicial grace, it is the command of Congress in 28 U.S.C. §1738 (1976). *Id.* at 96.

In dissent, Justice Blackmun characterized the majority's opinion as meaning that:

> the collateral estoppel effect of prior state adjudication should turn on only one factor, namely, what it considers the "one general limitation" inherent in the doctrine of preclusion: "that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." If that one factor is present, the Court asserts, the litigant properly should be barred from relitigating the issue in federal court.

Id. at 113 (citation omitted). The operation of this rule, Justice Blackmun continued, "of course would bar a § 1983 litigant from relitigating any issue he *might* have raised, as well as any issue he actually litigated in his criminal trial." *Id.* at 113 n. 12 (emphasis in original).

The majority took exception to this interpretation, observing:

> Contrary to a suggestion in the dissenting opinion, this case does not involve the question whether a § 1983 claimant can litigate in federal court an issue he might have raised but did not raise in previous litigation.

Id. at 94 n. 5 (citation omitted). Thus, the precise question presented by the case at bar specifically was not addressed in *Allen* and remains to be decided by this Court.

Continuing its comment upon the dissent, the majority stressed that:

> our decision today does not "fashion" any new, more stringent doctrine of collateral estoppel, *nor does it hold that the collateral estoppel effect of a state court decision turns on the single factor of whether the State gave the federal claimant a full and fair opportunity to litigate a federal question.* Our decision does not "fashion" any doctrine of collateral estoppel at all. Rather, it construes § 1983 to determine whether the conventional doctrine of collateral estoppel applies to the case at hand.

Id. at 95 n. 7 (citation omitted) (emphasis added). Signifi-

cantly, in reversing the Court of Appeals the Court remanded the case to "decide *how* the body of collateral estoppel doctrine or 28 U.S.C. §1738 should apply in this case." *Id.* at 105 n. 25 (emphasis in original).

Allen strongly suggests that the conventional doctrine of collateral estoppel should apply to the instant case rather than a "new more stringent" (*id.* at 95 n. 7) variety.[3] As the Circuit Court correctly pointed out, the majority's response to the dissent leads inescapably to the conclusion that:

> a state's failure to provide a full and fair opportunity to litigate the issue might, within the conventional doctrine, *avoid* an otherwise appropriate application of collateral estoppel, rather than the obverse, that provision of the full and fair opportunity, standing alone, gives rise to collateral estoppel.

Prosise, 667 F.2d at 1137 n. 1 (emphasis in original).

Although it may be true that the legislative history of §1983 indicates no intent to repeal or restrict the conventional doctrine of collateral estoppel, neither does it evidence an intent to permit federal courts to apply "any new more stringent doctrine of collateral estoppel" (*id.* at 95 n. 7) or to ignore the command of §1738, merely because respondent

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[3]Petitioners argue that "[t]he doctrine of res judicata ... is also applicable to the *Prosise* case" (Petitioners' Brief 21-22). In their motion for summary judgment in the District Court, however, petitioners asserted only that respondent's "claim is barred under the doctrine of collateral estoppel" (J.A. 20). The District Court (J.A. 49, 52) and the Circuit Court (667 F.2d at 1142-43) limited their holdings to the question whether respondent was collaterally estopped from litigating those claims. Finally, in their Petition For Writ Of Certiorari, petitioners sought review on the question "Does a conviction based upon a plea of guilty collaterally estop" respondent's §1983 suit (Petition For Writ Of Certiorari at i). Consequently, petitioners cannot assert at this late date that the broader doctrine of res judicata applies to bar respondent's claims. *See generally* R. Stern & E. Gressman, *Supreme Court Practice* 456-65 (5th ed. 1978).

pleaded guilty. On the contrary, federal courts "can afford [state judgments] no greater efficacy," *Union & Planters' Bank of Memphis v. Memphis*, 189 U.S. 71, 75 (1903), than would the rendering state.

In this regard, *Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883 (1982), conclusively established that federal courts may give no *greater* preclusive effect to state court judgments than would the rendering state. In reaching this conclusion, the Court stated:

> It has long been established that § 1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken.

Id. at 1897.

The command of § 1738 is particularly appropriate in § 1983 suits which are directed at state rather than federal agents. The state obviously has a strong interest in establishing the rules of preclusion in such matters. On the other hand, giving preclusive effect to a Virginia judgment beyond that afforded by Virginia's own rules of preclusion would do greater violence to the admittedly important concerns of comity and federalism than does permitting this suit.

Consequently, the court below was correct when it turned first to the preclusion rules of Virginia to determine the preclusive effect to be given respondent's guilty plea. As the Circuit Court correctly recognized, the settled law of Virginia is that, with limited exception not relevant here, criminal convictions, whether by plea or by trial, have no preclusive effect in subsequent civil actions.

B. Virginia Law Gives No Preclusive Effect To Criminal Convictions In Subsequent Civil Actions.

As the Court of Appeals correctly noted, the general rule of preclusion in Virginia derives from the holding in *Supervisors of Tazewell County v. Norfolk & Western Ry. Co.*, 119 Va. 763, 91 S.E. 124 (1916):

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Aetna Casualty & Surety Co. v. Czonka, 200 Va. 385, 388, 105 S.E.2d 869, 872 (1958).

In *Czonka*, a person in privity with the civil defendant had entered a guilty plea to an offense which had as an essential element a dispositive issue in the civil suit. The court refused to give the guilty plea any preclusive effect, referring instead to the general rule of *Tazewell County* that criminal convictions have no preclusive effect in subsequent civil suits. Thus, in Virginia, criminal convictions, whether by plea or by trial, are given no preclusive effect in subsequent civil actions.[4]

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[4]The single limited exception to this rule arises in civil actions in which the plaintiff seeks to benefit by the wrong for which he previously was convicted. The exception was identified and explained in *Eagle, Star & British Dominions Insurance Co. v. Heller*, 149 Va. 82, 140 S.E. 314 (1927), in which the civil plaintiff sought to recover under an insurance policy for goods he previously was convicted of intentionally burning. Even in such cases, though, the court carefully limited the exception to instances in which the civil plaintiff "has once litigated the identical question and had it adversely decided" in the criminal trial. 149 Va. at 89.

Virginia has maintained the general rule of preclusion announced in *Tazewell County* for over 65 years, consistently applying it to other circumstances and in other contexts. For instance, in *Luke Construction Co. v. Simpkins,* 223 Va. 387, 291 S.E.2d 204 (1982), the Virginia Supreme Court reiterated that the preclusive effect of collateral estoppel "extends only to those facts in issue which were adjudicated in the former proceeding." *Id.* at 205. And in *Bernau v. Nealons,* 219 Va. 1039, 254 S.E.2d. 82 (1979), the court instructed that, "one who asserts the defense of res adjudicata [sic] has the burden of proving that the very point or question was in issue and determined in the former suit." *Id.* at 1043 (quoting *Feldman v. Rucker,* 201 Va. 11, 18, 109 S.E.2d 379, 384 (1959)). Finally, in *Hosier v. Hosier,* 221 Va. 827, 273 S.E.2d 564 (1981), the court stressed that:

> A judgment is not res adjudicata [sic] if it does not go to the merits of the case. To constitute a bar, it must appear either upon the face of the record or be shown by extrinsic evidence that the previous question was raised and determined in the former suit, and that the former suit was determined on its merits.

Id. at 830 (quoting *Storm v. National Mutual Insurance Co.,* 199 Va. 130, 134, 97 S.E.2d 759, 761 (1957)).

The court has explained that the rule against giving preclusive effect to criminal convictions is based upon the rule of mutuality which bars a party "from invoking the preclusive force of a judgment unless he would have been bound had the prior litigation of the issue reached the opposite result." *Norfolk & Western Ry. Co. v. Bailey,* 221 Va. 638, 640, 272 S.E.2d 217, 218 (1980). Although largely discarded in federal courts, *see Allen v. McCurry,* 449 U.S. at 94-95, the Supreme Court of Virginia consistently has

declined to abandon this rule both in cases of attempted "offensive" use of collateral estoppel, *Norfolk & Western Ry. Co., supra,* as well as in cases of attempted "defensive" use of collateral estoppel. *Greene v. Warrenton Production Credit Assoc.,* 223 Va. 462, 291 S.E.2d 209 (1982). Since under Virginia law petitioners in this action would not be bound in a subsequent damages action by the state court's ruling on a motion to suppress had one been made and granted, Virginia's well-settled rules of preclusion do not bar respondent from raising his claims in this suit.

Unfortunately, in its commendable effort to find a Virginia decision on "the precise, narrow question of the preclusive effect of a guilty plea judgment upon issues that in the state criminal prosecution could only have been relevant to determining the admissibility of evidence" (667 F.2d at 1138), the court below missed the forest for the trees. If, as has been discussed above and as was found by the Court of Appeals, Virginia would give no preclusive effect to a guilty plea on even essential elements of the offense, *a fortiorari* Virginia would give no preclusive effect in subsequent civil suits to challenges to the admissibility of evidence which could have been but were not made in the prior criminal trial. Moreover, because petitioners here would not have been bound by such a ruling on the admissibility of evidence had one been made, under well-settled rules of preclusion in Virginia, respondent likewise is not precluded from litigating his claims in this action.

For these reasons, as well as those enunciated by the court below, respondent is not precluded by the conventional doctrine of collateral estoppel as developed in Virginia from litigating his Fourth Amendment claims in this suit. Because the Court of Appeals considered the issue unsettled in Virginia, and turned its attention to general collateral estoppel principles as developed in federal courts "as a guide

to Virginia's likely view were the precise question presented to its highest court or as an independent source for the proper application of collateral estoppel doctrine to our question" (667 F.2d at 1139), respondent likewise will discuss those general principles of collateral estoppel.

C. The Conventional Doctrine Of Collateral Estoppel Developed In Federal Courts Gives No Preclusive Effect To Guilty Pleas And Therefore Does Not Bar Litigation Of Previously Unlitigated Fourth Amendment Claims In A Federal Cause Of Action Under § 1983.

As dissupped above, *supra* at 10, the conventional doctrine of res judicata developed in federal courts "precludes the parties ... from relitigating issues that were *or could have been* raised in [an earlier] action." *Kremer v. Chemical Construction Corp.*, 102 S.Ct. 1883, 1889 n. 6 (1982) (emphasis added). On the other hand, "[u]nder collateral estoppel, once a court decides an issue of fact or law necessary to its decision, that decision precludes relitigation of the same issue on a different cause of action between the same parties." *Id.* at 1889-90 n. 6. Thus, whereas the broader doctrine of res judicata precludes litigation of issues that could have been raised in the earlier action, collateral estoppel leaves "parties free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948).

Because this Court stressed in *Allen* that "the conventional doctrine of collateral estoppel applies" in § 1983 suits raising Fourth Amendment claims, and not some "new more stringent doctrine of collateral estoppel" (449 U.S. at 95 n.

7), respondent is not precluded by the earlier state proceeding unless his guilty plea somehow involved a litigation of the search and seizure claims at issue.[5]

As the court below correctly noted, the *Restatement of Judgments* suggests that criminal convictions based upon guilty pleas can have no collateral estoppel effect as to any issues because none actually has been litigated. *Restatement (Second) of Judgments* 133, Comment b (1980). *See also Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *Cf. United States v. International Building Co.*, 345 U.S. 502 (1953) (prior judicial determination of tax liability based upon a stipulation of the parties refused collateral estoppel effect where it was unclear whether the stipulation was based upon the merits of the claimed tax liability). Whatever may be said about guilty pleas constituting a waiver of antecedent constitutional claims, *see* Petitioners' Brief 28-32, it cannot be argued that any issues actually are "litigated" in the traditional sense of the word.

This conclusion is reinforced by this Court's decisions with regard to the nature of the guilty plea and the plea bargaining process in the so-called *Brady* trilogy[6] and in

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[5]It is important to note the limited nature of the issue before the Court. The narrow question presented by this case is whether a state court judgment entered on a guilty plea may preclude litigation in a subsequent federal §1983 action of a claim that was neither raised nor litigated in state court, and which only could have been litigated in a motion to suppress evidence on Fourth Amendment grounds. The Court is not faced with the related questions of whether a guilty plea may preclude litigation of essential elements of the offense to which the state defendant pleaded guilty, or whether such a plea may be preclusive as to *any* §1983 issue. In light of the Circuit Court's express refusal to answer these questions, *Prosise*, 667 F.2d at 1138, respondent submits they are not properly before the Court and need not be decided. However, because of the possibility that the Court will reach them, the relevant principles are discussed above.

[6]*Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); and *Parker v. North Carolina, 397 U.S. 790 (1970).*

North Carolina v. Alford, 400 U.S. 25 (1970). This Court has stressed that the guilty plea and the plea bargaining process, when properly administered, are vital components of our criminal justice system. *Bordenkircher v. Hayes,* 434 U.S. 357 (1978). Such pleas necessarily reflect the consent of the defendant to have judgment entered without a trial, *North Carolina v. Alford,* 400 U.S. 25 (1970), and a willingness on the defendant's part to "enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady v. United States,* 397 U.S. 742, 753 (1970). Guilty pleas also obviate the costly and time consuming process involved in a pre-trial motion to suppress evidence and jury trial. Thus, there are strong policy considerations favoring guilty pleas.

As the *Brady* Court correctly recognized, though, a person charged with crime might intelligently plead guilty for any number of reasons both related and unrelated to factual guilt. In *Alford,* the Court held that even an assertion of factual innocence is not a bar to a voluntary and intelligent guilty plea, recognizing that many reasons exist for pleading guilty aside from belief in one's factual guilt. As the *Alford* Court observed:

> since "guilt, or the degree of guilt, is at times uncertain and elusive," "[a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty ..." As one state court observed nearly a century ago, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, ... [and] [h]e must be permitted to judge for himself in this respect."

Id. at 33 (citations omitted). Thus, it is clear that a guilty plea standing alone can have no collateral estoppel effect since it

does not necessarily imply an admission of the facts necessary to establish guilt, and because it does not involve litigation of those facts in the adversarial sense.

These cases compel rejection of petitioners' repeated claim that the only possible reason respondent would have entered a guilty plea is due to his factual guilt. Likewise, this reasoning compels rejection of the "emerging doctrine", *Prosise,* 667 F.2d at 1140, of collateral estoppel permitting preclusion of claims which involve elements of the crime charged. No sound reason in logic or the law permits preclusion of such "element-issues" (*id.*) in guilty plea cases because, as this Court repeatedly has recognized, guilty pleas do not necessarily involve an admission even of the elements of the offense.

Even more distressing is petitioners' argument and the District Court's conclusion that "the plea of guilty necessarily implied that the search giving rise to the incriminating evidence was lawful" (J.A. 52). Aside from totally ignoring the import of *Alford* and the *Brady* trilogy that many reasons exist for pleading guilty, aside from an admission of factual guilt, petitioners' argument is based on the mistaken premise that search and seizure issues are somehow akin to element-issues; that the exclusion of evidence arises naturally from the unlawful police conduct. That argument would have validity only if guilty pleas preclude element-issues, and only then if the exclusion of illegally seized evidence were a constitutional requirement, which it of course is not. *See, e.g., Stone v. Powell,* 428 U.S. 465, 483 (1976) ("The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment.") Although a guilty plea may act as a waiver of objections to the admissibility of evidence used to support a plea, *McMann v. Richardson,* 397 U.S. 759 (1970), it can in no

way be characterized as an admission of the lawfulness of the manner in which such evidence was obtained.

Even were the Court to conclude that a plea of guilty may preclude litigation of element-issues because of the defendant's judicial "admission of factual guilt," *Menna v. New York*, 423 U.S. 61, 63 (1975), no such preclusive effect can be given to Fourth Amendment claims because a guilty plea involves no such admission on those questions.

D. The Fact That The State Provides A Procedural Mechanism For Challenging The Lawfulness Of Searches And Seizures In Criminal Trials Does Not Preclude Respondent From Litigating Previously Unlitigated Claims In A Federal § 1983 Action.

Respondent concedes, as he must, that Virginia provides a procedural mechanism for challenging the lawfulness of searches and seizures in criminal trials, and in that sense afforded him a "full and fair opportunity," *Allen*, 449 U.S. at 104, to litigate his Fourth Amendment claims. However, respondent agrees with the court below that, whereas the state's failure to provide such a mechanism would avoid application of collateral estoppel, provision of such a mechanism, standing alone, does not bar his claims. *Prosise*, 667 F.2d at 1137 n. 1.

What the "full and fair opportunity" language in *Allen* must mean is that if one takes advantage of state procedural mechanisms for challenging the lawfulness of a search and seizure, he or she normally is bound by the state court's decision insofar as the state's preclusion rules give it collateral estoppel effect; unless the procedural mechanism does not satisfy the requirements of due process, that is, did not afford a "full and fair opportunity" to litigate such claims. On the other hand, if, as is true in Virginia, no

preclusive effect is given to criminal judgments, the existence of such a procedural mechanism will not preclude subsequent litigation of Fourth Amendment claims. Otherwise, there would have been no reason for the *Allen* Court to remand the case to the Circuit Court to "decide *how* the body of collateral estoppel or 28 U.S.C. §1738 should apply in th[at] case" (449 U.S. at 105 n. 25) since McCurry clearly had litigated and lost his claims in state court.

It is interesting to note that the "full and fair opportunity" language of *Allen* also is used in *Stone v. Powell*, 428 U.S. 465 (1976), where the Court cited *Townsend v. Sain*, 372 U.S. 293 (1963), as providing a relevant measure of the adequacy of the opportunity afforded by the state to litigate Fourth Amendment claims. *Stone*, 428 U.S. at 493 n. 36. *Townsend* dealt with the adequacy of state proceedings as a guide to determining whether a federal habeas corpus court must grant a state petitioner a new evidentiary hearing before ruling on the habeas petition. In that regard, this Court held that:

> a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Id. at 313.

Although respondent does not contend that *Townsend* provides a mechanistic measure of the adequacy of the opportunity afforded to those who invoke the state's proce-

dural mechanism for testing the lawfulness of a search and seizure, neither can *Townsend* be ignored. For example, if the state conducted a hearing on a defendant's Fourth Amendment claim, but refused to resolve the merits of the claim, clearly that would not satisfy the "full and fair opportunity" standard. Thus, in instances in which the state defendant takes advantage of the state mechanism, *Townsend* provides a useful guide for testing the adequacy of the opportunity afforded. However, neither *Allen* nor *Townsend* bar a subsequent civil suit merely because the state provides a mechanism for testing the lawfulness of searches, unless the state's rules of preclusion require that result.

II.

BY PLEADING GUILTY IN STATE COURT RESPONDENT DID NOT VOLUNTARILY AND INTENTIONALLY WAIVE HIS RIGHT TO LITIGATE ANTECEDENT FOURTH AMENDMENT CLAIMS IN A SUIT UNDER 42 U.S.C. § 1983.

Petitioners argue that respondent's guilty plea constitutes a waiver of his right to challenge the lawfulness of an antecedent search and seizure claim in a § 1983 action (J.A. 28-32). This argument, however, fundamentally misapplies the law and ignores the obvious differences between an action under § 1983 and a federal habeas corpus petition. Simply stated, the doctrine of collateral estoppel, unlike the doctrine of res judicata, does not include an element of waiver, so that under the former doctrine "the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been

tendered and decided at that time." *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 598 (1948).

Petitioners' error arises from their interpreting habeas corpus cases (that do not even involve waiver) to imply a waiver in §1983 actions. Specifically, petitioners rely upon *Tollet v. Henderson*, 411 U.S. 258 (1973), to construct an argument that "a criminal defendant who pleads guilty waives the right to raise antecedent constitutional objections in subsequent proceedings" (J.A. 28). This characterization of the holding in *Tollet* is only partly correct. What *Tollet* actually held is that a state prisoner who pleaded guilty is foreclosed from seeking his release from custody through a federal habeas corpus action challenging his conviction on the basis of constitutional claims antecedent to his guilty plea. *Id.* at 266.

Tollet simply has no application to cases in which a civil plaintiff seeks money damages for constitutional violations in a §1983 action. In fact, as the Court pointed out in *Menna v. New York*, 423 U.S. 61, 62 n. 2 (1975), *Tollet* is not a waiver case at all. Rather, *Tollet* stands for the proposition that:

> a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea [as a means of obtaining his release from custody in a federal habeas corpus action].

Id. at 267.

Thus, *Tollet* has no application to the instant suit for damages under §1983. Respondent does not challenge the lawfulness of his conviction; nor does he seek release from custody. Rather, respondent has done just what several

members of this Court have encouraged criminal defendants to do: admit his guilt and seek civil damages relief for antecedent Fourth Amendment violations.

The flaw in petitioners' argument is illustrated by *Preiser v. Rodriguez*, 411 U.S. 475 (1973), in which the Court explained:

> [i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy [for alleged constitutional violations].

Id. at 494 (emphasis in original). In his §1983 complaint instituting this suit, respondent sought neither a declaration that his criminal conviction is invalid, nor an injunction to prevent its enforcement. Instead, respondent sought only compensatory and punitive damages as a means of redressing the antecedent constitutional violations, and as a means of deterring such violations by these officers in the future (J.A. 12-13).

Petitioners nevertheless argue that permitting respondent to litigate this suit "will encourage persons convicted on guilty pleas ... to challenge their state court convictions through §1983 actions" (Petitioners' Brief 14), and that it would create "a new method by which defendants can indirectly attack the validity of their quilty pleas" (Petitioners' Brief 15). The fundamental flaw in this reasoning is that regardless of the outcome of this §1983 suit, respondent still will be precluded by *Tollet* from seeking to challenge either his guilty plea or his conviction in order to obtain his release from custody on the basis of the constitutional claims which underlie this suit.

Significantly, petitioners fail to discuss the well established standard that "a waiver is an intentional relinquish-

ment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). A guilty plea, standing alone, does not evidence such an intentional relinquishment of a statutory right to sue state agents for damages under §1983 for antecedent constitutional violations. Nor does the decision not to object to such violations in a pre-trial motion to suppress evidence exhibit an intentional relinquishment of the statutory right.

What a guilty plea does evidence is "the defendant's admission ... that he committed the acts charged in the indictment," *Brady v. United States*, 397 U.S. 742, 748 (1970), and his "consent that judgment of conviction may be entered without a trial." *Id.* at 748. The collateral consequences of a guilty plea, while justifiably foreclosing subsequent habeas corpus attacks based upon the validity of the plea itself, should not extend to the point of precluding a statutorily created remedy for violations of the federal constitution.

III.

SECTION 1983 PROVIDES AN ALTERNATIVE MEANS OF REDRESS FOR VIOLATIONS OF THE FOURTH AMENDMENT PERMITTING PERSONS TO PLEAD GUILTY IN STATE COURT WITHOUT SEEKING TO EXCLUDE THE EVIDENCE OF THEIR GUILT, AND THEN TO SEEK DAMAGES IN AN ACTION AGAINST ERRING STATE AGENTS UNDER 42 U.S.C. §1983.

The underlying premise of petitioners' position is stated in their first argument: "The decision of the Fourth Circuit will encourage persons convicted on guilty pleas to litigate

claims of unlawful search and seizure ... through §1983 actions" (Petitioners' Brief 14) rather than through motions to suppress evidence in their criminal trials. This premise is founded on the absurd notion that criminal defendants place more value on a potential damages award than on their liberty. Petitioners seem to suggest a preference for application of the exclusionary rule over litigation of a search's constitutionality in a civil action under §1983. That preference is not surprising in light of the fact that petitioners would not be directly affected if a motion to suppress evidence were granted, whereas they personally would be mulcted in damages if this suit were successful. In other words, if they have erred, petitioners would rather society in general suffer the consequences than have to suffer for it themselves.[7]

That society and not erring police officers must suffer the consequences of Fourth Amendment violations is the very basis of the debate raging within the legal community over the efficacy of the exclusionary rule as a remedy for such constitutional violations. *See, e.g., Illinois v. Gates,* No. 81-430 (U.S. Oct. 18, 1982) (restored to the calendar for reargument on the question whether to create a good-faith exception to the exclusionary rule); *California v. Minjares,* 443 U.S. 916 (1979) (Rehnquist, J., dissenting from denial of a stay); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971) (Burger, C.J., dissenting); Burger, *Who Will Watch the Watchman?,* 14 Am.Univ.L.Rev. 1 (1964). It would be alarmingly ironic for the Court to establish a good-faith exception to the judicially created exclusionary rule on the ground that it is

[7] In this regard, it is important to keep in mind that this suit involves an allegation of a deliberate Fourth Amendment violation rather than a good-faith error in judgment (*see* Complaint, J.A. 1-13). For that reason as well, it is inappropriate and unwise to shift the collateral consequences of petitioners' unlawful conduct from them personally to society at large.

"the guilty [who] go free because the constable has blundered," *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), while simultaneously closing the last open door to a statutorily created §1983 damages remedy *merely* because the criminal defendant is willing to admit his guilt and suffer the consequences. Even more significantly, perhaps, such a result would give police officers the "impression, however unwarranted, that all constitutional restraints on police had somehow been removed—that an open season on 'criminals' had been declared." *Bivens*, 403 U.S. at 421 (Burger, C.J., dissenting).

It is important to note that in *Wolf v. Colorado*, 338 U.S. 25 (1949), this Court held that the Fourth Amendment was applicable to the states through the Fourteenth Amendment, but that the states were free to choose from among the various remedies for Fourth Amendment violations and were not constitutionally obligated to adopt the exclusionary rule. However, only twelve years later, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court overruled *Wolf* and held that the states indeed were required to adhere to the exclusionary rule, concluding that it represented the only viable means of enforcing the Fourth Amendment because experience had shown civil damages actions against erring police officers to be ineffectual.

Simultaneous to the development of the exclusionary rule, the Court was reevaluating the long dormant Ku Klux Klan Act, 42 U.S.C. §1983, which creates a private cause of action against state agents for redress of violations of the federal constitution. At the time of *Mapp*, the Court apparently felt §1983 was an inadequate alternative to the exclusionary rule. Since then, however, §1983 has undergone many changes.

In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court held that state agents sued under §1983 may be liable for both

compensatory and punitive damages. In *Monell v. New York City Dept. of Social Services,* 436 U.S. 658 (1978), the Court provided a "deep state pocket," *Minjares,* 443 U.S. at 925, for redress of constitutional violations by holding that municipalities are "persons" within the meaning of §1983, and that one seeking redress for the deprivation of federal rights need not initiate alternative (though perhaps adequate) state remedies before filing a §1983 action. In *Owen v. City of Independence,* 445 U.S. 622 (1980), the Court held that municipalities sued under §1983 are not entitled to qualified immunity by asserting the good-faith of its agents as a defense. And in *Patsy v. Board of Regents,* 102 S.Ct. 2557 (1982), the Court held that one need not exhaust alternative state remedies before bringing an action under §1983 for redress of federal constitutional violations.

Respondent does not mean to imply that he believes that §1983 now is adequate to fully supplant the exclusionary rule as a remedy for Fourth Amendment violations. On the contrary, respondent submits that the two remedies are complementary and should be maintained in their current form. However, for persons such as respondent who are willing to admit their guilt without consuming the state court's valuable resources, neither law nor public policy is served by foreclosing a statutory federal remedy for redress of constitutional violations which in no way implacate the validity or finality of state convictions.

The primary justification of the exclusionary rule is the need for deterrence of unlawful police activity. *See Stone v. Powell,* 428 U.S. 465 (1976). Although the basic purpose of §1983 is to compensate persons for injuries caused by violations of their constitutional rights, *Carey v. Piphus,* 435 U.S. 247 (1978), it goes without saying that damage actions

have the additional function of deterring and punishing state agents for Fourth Amendment violations. *Carlson v. Green*, 446 U.S. 14 (1980). Because the two remedies accomplish the same objective of deterring unlawful police activity, and because this Court has held that a person aggrieved by unlawful police conduct need not invoke alternative state remedies before invoking § 1983, *Patsy v. Board of Regents*, 102 S.Ct. 2557 (1982), no reason exists for requiring persons like respondent to seek exclusion of the evidence of their guilt rather than invoking § 1983 to redress constitutional claims unrelated to their guilt.

Petitioners, on the other hand, argue that permitting this suit to go forward will encourage such litigation (Petitioners' Brief 14), and *amici* complain that it "will subject increasing numbers of law enforcement officers to the harassment and vexation of groundless civil litigation" (Brief of *Amici* Americans For Effective Law Enforcement 5) (hereinafter Brief of *Amici*), supporting their argument with statistics on the increasing number of civil suits filed in federal courts.[8] (Brief of *Amici* 5-11). Aside from the fact that these statistics do not reveal anything about the number of frivolous claims among those lawsuits, the possibility of increased litigation—even of possibly frivolous litigation—does not justify "closing the courthouse door" to persons aggrieved by Fourth Amendment violations. *Bivens v. Six*

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[8]It is interesting to note that the International Association of Chiefs of Police [IACP], who have joined as *amicus curiae* in support of petitioners, also opposes creation of the sort of administrative or quasi-judicial police review bodies proposed by the Chief Justice in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting). *See* IACP Speakers Discuss Legal Problems In Disciplining Police Officers, 32 Cr.L. 2221, 2222 (Dec. 15, 1982). Apparently IACP is content to have criminal defendants seek to exclude relevant evidence of their guilt rather than subject IACP members to administrative or judicial review of their actions.

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring).

Moreover, if the burden on federal courts is becoming more than the system can handle, then Congress should eliminate diversity jurisdiction cases, which raise no federal questions, before restricting a statutorily created remedy for federal constitutional violations. Additionally, when Congress has noted that a particular form of § 1983 action has become too burdensome on the courts, it has shown itself willing to alleviate the problem by passing new legislation to deal with it. *See* The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.* (1976 ed., Supp. IV). Finally, as the Court observed in *Harlow v. Fitzgerald*, 102 S.Ct. 2727 (1982), any suits engendered by the Court's ruling in this case need not receive "full litigation" (Petitioners' Brief 27), but may be disposed of on motions for summary judgment without inquiry into the "subjective good-faith" of the officers. *Id.* at 2738.[9]

In short, petitioners' position would subvert the strong policy of providing a federal forum for adjudication of federal constitutional rights. *See, e.g., Steffel v. Thompson*, 415 U.S. 452 (1974); *McNeese v. Board of Education*, 373 U.S. 668 (1963); *Monroe v. Pape*, 365 U.S. 167 (1961). Although the *Allen* Court found this consideration insufficient to override the application of conventional doctrines of collateral estoppel, *see Allen v. McCurry*, 449 U.S. at 98-99, it still is a sufficient interest counselling against an extension of the preclusion doctrine beyond that envisioned by Congress in § 1738, and beyond that permitted by the state where the Fourth Amendment violation occurred.

[9]Although *Harlow* involved a direct constitutional cause of action under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court noted in *dictum* quite logically that no distinctions for purposes of immunity should be drawn between such actions and actions under 42 U.S.C. § 1983. *Harlow*, 102 S.Ct. at 2738-39 n. 30.

CONCLUSION

For the foregoing reasons, and in the interest of justice and fundamental fairness, respondent respectfully submits that the judgment of the Court of Appeals was correct and should be affirmed.

Respectfully submitted,

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